STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 94B014
CCRD Charge No. S94DR007

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RODNEY MCKEE,

Complainant,

vs.

DEPARTMENT OF INSTITUTIONS,
DIVISION FOR DEVELOPMENTAL DISABILITIES,
WHEAT RIDGE REGIONAL CENTER,

Respondent.

INTRODUCTION

Pursuant to Respondent's Motion to Amend Initial Decision, filed on April 20, 1995, the original Initial Decision of April 13, 1995 is hereby amended by deleting paragraph 5 under the heading **STIPULATIONS** at page 2.

Hearing was held on October 20, 1994 and March 2 and 3, 1995 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Thomas S. Parchman, Assistant Attorney General. Complainant appeared and was represented by Carol M. Iten, Attorney at Law.

Respondent's witnesses were: Art Carlton, Supervisor; Roy Caldwell, Physical Plant Supervisor; Robert Huss, Senior Maintenance Mechanic; Janis Marie Kline, Human Resources Specialist; Jere Hart, Facility Manager; Michael Guthrie, Physical Plant Manager; Larry Stucky, Human Resources Specialist III, Colorado Department of Personnel; and James Gracey, who was certified as an expert in the areas of vocational rehabilitation, job placement, job site analysis and functional capacity

evaluation. Respondent also called Complainant as a witness in its case-in-chief. Complainant testified in his own behalf and called as witnesses Robert Huss, Roy Caldwell, and Vernon Jackson, Risk Manager/ADA Coordinator, Wheat Ridge Regional Center.

Respondent's Exhibits 1, 7 and 12 and Complainant's Exhibit T were stipulated into evidence. Respondent's Exhibits 2, 3, 8, 9, 22, 24, 26, 27 and 29 were admitted without objection. Exhibits 21, 23A, 25 and 28 were admitted over objection. Complainant's Exhibits K and Y were admitted without objection. Exhibits U, V and W were admitted over objection.

Administrative notice was taken of the finding of "no probable cause" of the Colorado Civil Rights Division in its investigation of Complainant's claim of discrimination.

MATTER APPEALED

Complainant appeals his July 16, 1993 administrative termination and alleges discrimination on the basis of physical disability.

ISSUES

1. Whether Complainant was discriminated against under the Americans With Disabilities Act;

2. Whether the administrative action of Respondent was arbitrary, capricious or contrary to rule or law;

3. Whether Complainant is entitled to an award of attorney fees and costs.

STIPULATIONS

1. Complainant has a permanent disability.

2. The validity of the agency's regulation regarding modified duty is not at issue in this proceeding.

3. Complainant exhausted all of his sick and annual leave prior to termination.

4. Complainant was properly notified that his leave was exhausted.

FINDINGS OF FACT

1. Complainant, Rodney McKee, became employed by the Wheat Ridge Regional Center (Ridge) on August 1, 1984. Complainant was originally hired as a carpenter and was certified as Senior Maintenance Mechanic at the time of the termination of his employment.

2. The responsibilities of a maintenance mechanic encompass the repair and maintenance of homes for the developmentally disabled. Complainant's duties included all aspects of carpentry work, painting, roofing, floor and wall tiling, plumbing, locksmithing, cement work, moving appliances and furniture, snow removal inclusive of the use of a snow blower, shovel and snow plow, and use and operation of all necessary tools and equipment.

3. On May 21, 1991, Complainant suffered a lower back injury on the job while moving a washer and dryer from a pickup truck. He went to work the following day only to find the pain in his back getting worse, and he couldn't straighten up. Ridge sent him to a physician, who diagnosed the injury as back strain.

4. Complainant worked only four hours a day for the next several months while he engaged in physical therapy.

5. On September 17, 1991, Complainant received a Functional Capacity Evaluation Report through Lutheran Rehabilitation Center which indicated that Complainant could return to work at the medium level of the physical demand characteristics of his job, with the following work restrictions:

1) Lifting 50 pounds as a one repetition maximum and 45 pounds occasionally.

2) Bilateral lift/carry capacity of 35 pounds and unilateral lift/carry of 20 pounds.

3) Upper extremity strength and whole body push/pull adequate for the application of moderate forces with tools.

4) Recurrent sitting and standing are optional at 30 minute intervals.

5) Stooping and crouching on an occasional basis. No sustained crouching or stooping.

(Complainant's Exhibit T.)

6. Complainant reached maximum medical improvement on October 2, 1991. (Respondent's Exhibit 1.)

7. On November 7, 1991, as a result of the work restrictions, Complainant was reassigned from the late shift to the shift from 11:00 a.m. until 7:00 p.m. His duties were adjusted to accommodate the work restrictions. (Respondent's Exhibit 2.) The work restrictions remained in effect at all times from the date of their imposition.

8. There are three maintenance mechanics at Ridge. In order to accommodate Complainant's physical limitations, his supervisor screened the work orders so projects requiring heavy lifting or other physical activity beyond Complainant's restrictions were

assigned to the other mechanics.

9. Vernon Jackson is the agency's ADA Coordinator and chairs the committee that determines whether reasonable accommodation can be made for an employee with a disability. The agency has implemented a modified duty program that is limited to 180 days. If the employee is unable to assume the duties of the position at the end of 180 days, then the employee must be placed in leave status. The employee is not expected to perform the essential functions of the job while on modified duty.

10. Complainant requested as a reasonable accommodation that he remain in modified duty status permanently. He also requested that a snow blower be provided so he could participate in snow removal. He further requested that he be given help when required to perform heavy or repeated lifting. (Respondent's Exhibit 7.)

11. Complainant was afforded the opportunity to appear before the full ADA committee. He and his representative met separately with Vernon Jackson on at least one occasion. The committee concluded that there was not a job within the agency for which Complainant was qualified and which he could fully perform. The committee concluded that the accommodations that Complainant had requested were not reasonable.

12. Upon the determination that Complainant was unable to perform the essential functions of the position of Senior Maintenance Mechanic, that reasonable accommodation could not be made to facilitate the same and that a vacant position for which Complainant met the minimum qualifications was not available within the agency, the ADA committee advised Complainant by letter dated June 29, 1993 that he would be required to assume leave status as of June 30, 1993. (Respondent's Exhibit 8.)

13. Complainant applied for permanent PERA disability benefits on or about September 14, 1993. (Respondent's Exhibit 22.) His application was approved.

14. Although maintenance mechanics assist each other once in a while, the job requires them to work alone for the most part and to complete the tasks assigned to them on their own. This is a "full service" position and requires that a broad range of physical functions be performed. Each mechanic tends to have more skills in some areas than in others, but there is no "specialization" as such. The job regularly requires that functions be performed that cannot be performed within the limitations of Complainant's work restrictions.

15. Because of the varied and mobile nature of the maintenance mechanic position, as well as the staffing pattern and budgetary limitations, it is not feasible for the agency to provide an assistant for Complainant to help him with the functions which he is otherwise unable to perform.

16. Since the termination of his employment from Ridge, Complainant has not applied for other jobs in the maintenance field.

17. As the result of having exhausted all of his accrued leave and being unable to physically perform the duties of his position, Complainant was administratively terminated by the agency on July 16, 1993. He filed a timely appeal ten days later.

DISCUSSION

In this appeal of an administrative termination, Complainant bears the burden to prove by a preponderance of the evidence that the agency's action was arbitrary, capricious or contrary to rule or

law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991). Complainant also bears the burden of proof to establish that the administrative termination was based on discrimination under the Americans With Disabilities Act (ADA).

The ADA requires state and local governmental entities to make all programs, services and employment accessible to disabled persons. The Act defines a person with a disability as: 1) a person with a physical or mental impairment that substantially limits a major life activity; 2) a person with a record of such physical or mental impairment; or 3) a person who is regarded as having such an impairment. 42 U.S.C. sec. 12102(2). "Substantially limits" means that a person is unable to perform, or is significantly restricted in performing, a major life activity that an average person can perform. 29 C.F.R. 1630.3(j)(1) (1992).

The ADA prohibits discrimination against "qualified individuals with disabilities". Employees are qualified for protection if they: 1) satisfy the prerequisites of the position by possessing the appropriate education, employment experience, skills, licenses and the like; and 2) they can perform the essential functions of the position, with or without reasonable accommodation. 42 U.S.C. sec. 12111(8); 29 C.F.R. 1630.2(m). The determination regarding the employee's qualifications should be based on the persons's capabilities at the time the employment decision is made. See Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991).

Employers must provide reasonable accommodation to qualified individuals with a disability. 29 C.F.R. 1630.9. Reasonable accommodation is a "change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. 1630.2(o). Employers are obligated to make reasonable accommodation only to employees with known disabilities. Id. The

disabled individual must inform the employer that an accommodation is necessary, unless such is obvious, and the employer may require documentation of the need for an accommodation. Id. Employers need not eliminate or reallocate essential job functions. Id. Employers need only provide an accommodation which enables the employee to perform the essential duties of the job, not necessarily the accommodation of the employee's choice. 29 C.F.R. 1630.9(d).

Complainant's initial burden is to establish a prima facie case of discrimination by showing by a preponderance of the evidence: 1) that he belongs to the protected class (person with a disability); 2) that he was otherwise qualified to perform the duties of the position; and 3) that an adverse action was taken against him because of the disability. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Once Complainant meets his initial burden, Respondent must rebut the presumption of discrimination by setting forth non-discriminatory justifications for the allegedly discriminatory practice. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Then Complainant is afforded the opportunity to show by preponderant evidence that Respondent's asserted business reason is a mere pretext for unlawful discrimination. McDonnell Douglas, supra. Ultimately, Complainant must prove that Respondent's action was the result of intentional discrimination rather than being personally motivated. St. Mary's Honor Center, et al. v. Hicks, 509 U.S._____, 113 S.Ct. _____, 125 L.Ed.2d 407 (1993).

Although Respondent's motion for a directed verdict on grounds that Complainant failed to establish a prima facie case of disability discrimination was denied at the close of Complainant's case-in-chief, a review of the evidence as a whole leads to the

conclusion that Complainant did not make a prima facie showing of discrimination with respect to the element of "otherwise qualified". Complainant did not prove by preponderant evidence that he was otherwise qualified to perform the essential functions of the job of Senior Maintenance Mechanic, with reasonable accommodation. See Jasany v. United State Postal Service, 755 F.2d 1244 (6th Cir. 1985). Respondent presented a wealth of evidence showing that this job regularly requires work beyond Complainant's work restrictions, such as heavy lifting and carrying, bending, crouching and stooping. To continue to accommodate Complainant within his physical limitations would have required a fundamental structural change in the position. This is more than an employer is required to do. Nor is the employer required to assure that a helper will be available whenever the employee needs to perform a task that he is physically incapable of accomplishing. Complainant's request for the accommodation of the use of a snow blower not only does not address the other functions he was unable to perform, but the use of a hand shovel would still be required and would violate the work restrictions. And it is questionable whether Complainant could, in fact, operate a snow blower and stay within the boundaries of his work restrictions.

An employer is not required to eliminate or reallocate essential job functions, yet the agency did that very thing for an extended period of time by screening all work orders to eliminate any tasks for Complainant which would require work beyond his physical limitations. It is found that this circumstance caused a hardship to Respondent because the agency then did not have three maintenance mechanics who were capable of performing all tasks as required and as mandated by the workload. Repair and maintenance work is such that any one of a variety of jobs may need to be completed at any given time. A particular function may need to be performed only several times during the year, but a maintenance

mechanic must be able to complete the task when it is at hand, especially in the case of an emergency.

Complainant's argument seems to be that he can perform some jobs at some times under certain conditions and that many of the more difficult jobs don't need to be done very often, anyway. To view the job of maintenance mechanic in this fashion is to view it as something it is not and in a way that would seriously hamper the agency in maintaining the homes of the developmentally disabled persons it serves. In addition to Complainant's failure to establish a prima facie case, Respondent put forth a legitimate business reason for the termination of employment, that is, the agency's very purpose of providing and maintaining residential facilities for developmentally disabled individuals in an acceptable and timely manner. Complainant failed altogether to rebut Respondent's purported business reason and did not show that Respondent's action was pretextual. Ultimately, there is an absence of evidence to suggest that Respondent's action was the result of intentional discrimination. St. Mary's Honor Center, supra.

Complainant presented some evidence that a job vacancy for a painter/locksmith occurred at some point in time and implied that he should have been offered that position. Yet Complainant concedes that he did not apply for the position. Complainant also failed to prove that he met the minimum qualifications or was physically able to perform the duties of the position. Complainant's argument in this regard appears to be a mere afterthought.

The outcome of this case is the same under state law as it is under federal law. Employment discrimination on the basis of physical disability is prohibited by the Colorado Unfair Employment Practices Act, sec. 24-34-401, et. seq., C.R.S. (1994

Cum Supp.). Under this statute, in order to establish a case of discrimination because of a disability, Complainant has the burden to show that he is disabled, that he is otherwise qualified for the job, and that he was terminated or otherwise suffered an adverse employment action as a result of his disability. Colorado Civil Rights Commission v. North Washington Fire Protection District, 772 P.2d 70 (Colo. 1989). If Complainant makes this showing, then the employer must demonstrate that there is no reasonable accommodation that can be made, that the disability actually disqualifies the individual from the job, and that the disability has a significant impact on the job. If the employer offers credible evidence that reasonable accommodation is not possible, Complainant must next show that his particular capabilities allow him to perform the job and other possible accommodations exist. Civil Rights Commission v. North Washington Fire Protection District, supra. To be "otherwise qualified" means that the person is able to meet all of the requirements of the job in spite of a disability. Id. A disabled person is otherwise qualified if, with reasonable accommodation, he can perform the essential functions of the job. See Civil Rights Division Rule 60.2 Sec. B, 3 Code Colo. Reg. 708.1 (1994). A disabled person must meet those requirements that are reasonable, legitimate and necessary. AT&T Technologies, Inc. v. Royston, 772 P.2d 1182 (Colo. App. 1989). See also Coski v. City and County of Denver, 795 P.2d 1364 (Colo. App. 1990).

In sum, there is an abundance of evidence to sustain Respondent's action pursuant to both federal and state law.

CONCLUSIONS OF LAW

1. Complainant was not discriminated against under the Americans With Disabilities Act.

2. The administrative action of Respondent was not arbitrary, capricious or contrary to rule or law.

3. Complainant is not entitled to an award of attorney fees.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of April, 1995, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol M. Iten
Attorney at Law
A.F.S.C.M.E. Council #76
789 Sherman Street, Suite 640
Denver, CO 80203

and in the interagency mail, addressed as follows:

Thomas S. Parchman
Assistant Attorney General

Department of Law
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1.To abide by the decision of the Administrative Law Judge ("ALJ").

2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is $50.00. The estimated cost to prepare the record on appeal in this case with a transcript is $1,837.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.